SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 454.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF LUIGI LUCHINI ET AL.,
Petitioners,

v.

THE FERRO CONCRETE CONSTRUCTION COMPANY ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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CITATIONS.

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BRIEF FOR THE RESPONDENTS, THE FERRO CONCRETE CONSTRUCTION COMPANY AND SEABOARD SURETY COMPANY, IN OPPOSITION.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the First Circuit [Record, p. 596] is reported in 112 Fed. (2d.) 488.

GROUNDS OF JURISDICTION CLAIMED BY PETITIONERS.

The judgment of the United States Circuit Court of Appeals for the First Circuit was entered June 4, 1940 [Record, p. 603]. A petition for rehearing was filed June 19, 1940, which was denied June 24, 1940 [Record, p. 603].

The petition for a writ of *certiorari* was filed September 23, 1940. The jurisdiction of this Court was invoked under the provisions of 28 U.S.C. Sec. 344 (b), 28 U.S.C. Sec. 347 (a), and 28 U.S.C. Sec. 723 (c).

QUESTIONS PRESENTED BY PETITIONERS.

The questions presented by the petitioners are as follows:

1. Did the Circuit Court of Appeals err in finding that there was no authority either real or apparent in Starr, the construction superintendent of the respondent The Ferro Concrete Construction Company, to make the alleged new agreement set forth in the pleadings; and did the Court err in finding that there was no ratification of his alleged act in making such alleged agreement?

2. Did the Circuit Court of Appeals err in finding for the respondents, in view of the petitioners' contention that a new contract was to be implied from the circumstances of the case?

3. Did the Circuit Court of Appeals (acting under Federal Rule 50 (b)) err in setting aside the verdict of the jury for the petitioners and the judgment thereon and directing the District Court to enter judgment for the respondents contrary to the verdict?

STATEMENT.

The statement of the facts of the case contained in the opinion of District Judge Peters, rendered by the United States Circuit Court of Appeals for the First Circuit, is accurate and fair. There are numerous misstatements and errors contained in the brief of the petitioners both in their Statement and in the Argument; and many of their assertions are not supported by the record; but we do not deem it desirable to expand this brief by replying in detail. We will give a brief summary of the facts, by way of addendum to the opinion below.

The travel of the case is sufficiently set forth in the opinion. The United States Government required an addition to be built upon the then existing Naval War College at Newport, Rhode Island [Record, p. 353 Q. 32]. The exterior of the old building was of granite [Record, p. 354 Q. 36–39]. It was necessary to procure similar granite for the exterior of the addition [Record, p. 354 Q. 37]. The respondent, The Ferro Concrete Construction Company (called Ferro herein), obtained the general contract with the Government for the construction of this addition [Record, p. 431 Q. 11 and 12], and it sought to find the necessary type of granite. One of the petitioners, L. Luchini & Son, a co-partnership consisting of Luigi Luchini and his son, James Luchini [Record, p. 42 Q. 1–3] (called Luchini herein), had a quarry in Milford, Massachusetts [Record, p. 110 Q. 501 *et seq.*] capable of furnishing the proper stone [Record, p. 354 Q. 40–41]. Luchini gave Ferro a bid on furnishing this stone delivered "truck to site" at Newport, finished, fabricated, and ready to set, for a price of $30,000 [Record, p. 46 Q. 31; Exhibit 5, Record, p. 46]. This bid was accepted, and a formal written contract was entered into and executed by the parties [Exhibit 11, Record, p. 525; introduced p. 54]. Luchini got into financial difficulties and did not have money enough to carry out the terms of his contract to furnish the granite [Record, p. 64 Q. 165 *et seq.;* p. 124 Q. 625].

Luchini claimed that a new oral agreement was entered into between him and Ferro [Record, p. 131 Q. 674–675] under the terms of which Ferro was to get the same quantity of the same granite which it was originally supposed to get under the terms of the written contract [Record, p. 114 Q. 545–555], but was to pay for that granite not the sum of $30,000 originally agreed upon and specified in the written contract, but "what it was worth to do the job" [Record, p. 70 Q. 211–214]. Luchini claimed it was entitled to $56,-

082.08 [Record, p. 114 Q. 548–555], instead of $30,000, and sued for $56,082.08 [Record, pp. 11–13].

Luchini contended that the alleged oral agreement of modification, by which the original written contract was changed, was entered into on behalf of Ferro by Ferro's superintendent of construction, Starr [Record, p. 70 Q. 211–214]. Ferro claimed that no such agreement was in fact ever made by Starr [Record, p. 366 Q. 126–143]; that, if it had been, it would have been legally ineffective (there being no consideration for the alleged promise); and further that if it had been made by Starr, it was clear that he had no authority to enter into any such modification agreement. The Circuit Court of Appeals ordered judgment for the defendants, the *ratio decidendi* being that there was no authority in Starr.

The Circuit Court of Appeals consisted of Circuit Judge Magruder, District Judge Peters, and District Judge McLellan,—Judge Peters writing the opinion. The petitioners' brief states that Judge Peters is retired [p. 7, Petitioners' Brief]. This is not true. The petitioners also state that, with respect to Judge McLellan, the case was submitted to him on briefs. They should have added that they themselves expressly consented to this [Record, p. 596]. In view of the implied suggestion by the petitioners that the Court was not competent, it is interesting to note that the third judge who heard the case, Circuit Judge Magruder, was one of the advisors who assisted in the preparation, by the American Law Institute, of the Restatement of the Law of Agency.)

ARGUMENT.

I. PETITIONERS' CASE RESTED ON AN ALLEGED ORAL MODIFICATION OF AN EXISTING WRITTEN CONTRACT, BUT THE PETITIONERS FAILED TO PROVE THAT THE MODIFICATION WAS MADE BY ANYONE HAVING AUTHORITY TO BIND THE RESPONDENT, THE FERRO CONCRETE CONSTRUCTION COMPANY.

Petitioners sued on an alleged oral modification of a written contract [Record, pp. 16–22, 35–38, p. 131 Q. 674–675]. They based that modification, as already stated above, on an alleged statement made by Starr, construction superintendent for Ferro [Record, p. 70 Q. 211–214]. Starr emphatically denied ever having made any such statement [Record, p. 366 Q. 126–143]. Even if he had made any such statement, two questions arose: (a) whether there was any consideration to support the alleged modification agreement; and (b) whether Starr had any authority, apparent, express or implied, to bind Ferro by such an agreement.

There is grave question whether such a modification would be valid as a matter of law, because a promise to do what one is already bound to do under a pre-existing contract with the same party does not, by the overwhelming weight of authority, constitute good consideration. The Circuit Court of Appeals could well have decided the case on this ground. It preferred, however, to decide the case on the ground that Starr had no authority, express, apparent or implied, to make the modification alleged. Speaking of this ground, the Court states in its opinion [Record, p. 602]: "For reasons given, without touching upon others advanced by counsel for the defendant, which may well have merit, we are satisfied that the law applicable to the case requires that the motion made at the close of the evidence that a verdict be directed for the defendant on the claim made against it by Luchini & Son should have been granted."

No novel question of law or problem of general importance is presented by this point. The only issue was whether there was sufficient evidence to go to the jury as to the existence of any authority, express, apparent or implied, in the witness Starr to enter into the alleged oral modification agreement. This is simply a question of fact on the record in this specific case. Under the principles laid down in Rule 38 of the Revised Rules of this Court, a writ of *certiorari* should certainly not be granted on this ground.

The petitioners make the argument that, on the question of ratification of Starr's alleged act, the Circuit Court of Appeals did not follow applicable decisions of this Court. The decisions cited by the petitioners support the general proposition fully recognized by the law of agency that the knowledge of an agent will be imputed to the principal in certain cases for purposes of applying the doctrine of ratification. However, there is a universally accepted and well-recognized exception to this rule, to the effect that the knowledge of the agent of his own unauthorized act will not be imputed to the principal for purposes of applying the doctrine of ratification.

1 Restatement of the Law of Agency, p. 220.

This question has already been raised by a petition for a writ of *certiorari* from this Court in the case of

General Paint Corporation v. *Kramer*, 57 Fed. (2d.) 698 (1932) (C.C.A. 10th. Circ.).

Certiorari was denied:

287 U.S. 605 (1932).

The opinion of the Circuit Court of Appeals in that case clearly sets forth the unsoundness of this contention of the petitioners.

II. THE PETITIONERS DID NOT MAKE OUT ANY CASE ON AN IMPLIED MODIFICATION OF THE CONTRACT.

Petitioners insist as a second ground for the granting of their petition for a writ of *certiorari* that they had some evidence that the contract referred to above was modified by implication, or by the conduct of the parties, and that, as this point was not considered by the Circuit Court of Appeals, the most that Court should have done was to grant a new trial. Here, again, no novel question of law requiring a writ of *certiorari* is presented.

No implied modification could be of any legal standing unless the original contract had first been abrogated. It is perfectly apparent from the testimony in the record that nobody had any authority to do any acts on behalf of Ferro inconsistent with the terms of the written contract dated March 25, 1933 [Exhibit 11, Record, p. 525; introduced p. 54] having to do with the amount which Ferro was to pay for the granite [Record, p. 380 Q. 220; p. 442 Q. 94–96; p. 507 Q. 30; p. 510 Q. 48; p. 511 Q. 52]. The Circuit Court of Appeals has already determined adversely to the petitioners the issue of Starr's authority to modify the written contract on behalf of Ferro. The record is devoid of any proof that any other person whose acts were relied upon by petitioners had any authority to do so either. Therefore the decision of the Circuit Court of Appeals on the first point was necessarily determinative of this point as well.

In the second place this contention of the petitioners completely ignores the existence of the doctrine of waiver. They seem to argue that because Ferro did not insist that deliveries of granite be begun and completed within the respective times specified in the written contract dated March 25, 1933, and because, due to Luchini's financial embarrassment and pleas for money, Ferro from time to time assisted him by advancing sums to him before they were due under the contract, and because, by agreement of the parties in writing [Exhibit 13, Record, p. 67], Ferro put a man into the Lu-

chini quarry to assist the Luchinis but not to interfere with their supervision of the work, these things constituted a modification by conduct of that portion of the written contract dated March 25, 1933, having to do with the amount Ferro was to pay for the granite. In the first place, the acts relied upon by the petitioners to vary the original written contract by implication or by the acts of the parties were simply acts of waiver by Ferro of provisions inserted in the written contract for the benefit of Ferro, which could be waived by Ferro without impairing the other provisions of the contract, particularly the provision as to the contract price. In the second place, such a contention raises questions of fact peculiar to this particular case; and no general or important problems of law are thereby presented. The case was amply argued and briefed before the Court below, and given detailed consideration by that Court. No proper case for the granting of a petition for *certiorari* is therefore made out by this point.

III. THE CIRCUIT COURT OF APPEALS HAD POWER UNDER RULE 50 (b) OF THE RULES OF CIVIL PROCEDURE TO ENTER JUDGMENT CONTRARY TO THE VERDICT.

Petitioners urge that the Circuit Court of Appeals had no power under Federal Rule 50 (b) to enter a judgment contrary to the verdict, and further urge that this point is one which should be decided by this Court.

The principles applicable to this problem are now clear and do not require this Court to grant *certiorari* in order to clarify them further.

These principles may be summarized as follows:

(1) Prior to the new Rules, the Circuit Courts of Appeals had no power to enter a judgment contrary to the verdict in the ordinary case.

> *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364 (1913).

This decision (a five to four decision with the present Chief

Justice writing the dissenting opinion) has been much criticized; but the question of whether it is still good law is now academic, as pointed out below.

(2) Prior to the new Rules, the principle of the *Slocum* case was modified as follows: If the trial Court took the verdict subject to the later determination of the legal questions raised by a motion for a directed verdict, the Circuit Courts of Appeals had the power to enter judgment contrary to the verdict, and the exercise of such power would not violate the right of jury trial guaranteed by the Seventh Amendment.

Baltimore & Carolina Line, Inc. v. *Redman,* 295 U.S. 654 (1935);

Aetna Insurance Co. v. *Kennedy,* 301 U.S. 389, 394 (1937).

(3) The new Rules, Rule 50 (b), adopt the principle of the *Redman* case in all cases where there is a motion for a directed verdict, in the following language:

> "(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. * * *"

The only question in the case at bar, therefore, is whether Rule 50 (b), by its terms, adopts the rule of the *Redman* case. The answer appears to be clearly in the affirmative. It can hardly be contended that the words in the rule "the Court is deemed" simply create a presumption which may be rebutted. This phrase indicates that a binding rule for all cases has been laid down, and the Circuit Courts of Appeals have so interpreted Rule 50 (b).

Lowden v. *Denton,* 110 Fed. (2d.) 274, 278 (1940) (C.C.A. 8th. Circ.) (Cert. den. 60 Supreme Court Reporter 1100) (1940);

Leader v. *Apex Hosiery Co.*, 108 Fed. (2d.) 71, 81 (1939) (C.C.A. 3rd. Circ.); (Cert. granted 60 Supreme Court Reporter 589) (1940); (Opinion 60 Supreme Court Reporter 982) (1940);

Conway v. *O'Brien*, 111 Fed. (2d.) 611, 613 (1940) (C.C.A. 2nd. Circ.);

United States v. *Marsh*, 107 Fed. (2d.) 173, 174 (1939) (C.C.A. 4th. Circ.);

Massachusetts Protective Association, Inc. v. *Mouber*, 110 Fed. (2d.) 203, 207 (1940) (C.C.A. 8th. Circ.);

Reliance Life Ins. Co. v. *Burgess*, 112 Fed. (2d.) 234, 240 (1940) (C.C.A. 8th. Circ.).

As noted above in the citation, *certiorari* has already been denied by this Court, where this point was involved, in

Lowden v. *Denton*, 110 Fed. (2d.) 274, *supra*; (Cert. den., 60 Supreme Court Reporter 1100, June 3, 1940).

In that case, the plaintiff obtained a verdict in the Court below. The defendant seasonably moved for a directed verdict, which motion was denied. The procedure of Rule 50 (b) was complied with. The Court refused to disturb the verdict, and the defendant appealed. The Circuit Court of Appeals for the Eighth Circuit reversed the judgment of the Court below and remanded the case with directions to enter judgment for the defendant. Subsequently a petition for *certiorari* was filed by the plaintiff, and on June 3, 1940, this petition was denied. The question of whether the Circuit Court of Appeals properly remanded the case with directions to enter judgment for the defendant was necessarily involved although not expressly raised.

Furthermore, in the case of

Leader v. *Apex Hosiery Co.*, 108 Fed. (2d.) 71, *supra*,

there was a verdict for the plaintiff, and a judgment was entered thereon. The defendants appealed, and the judgment of the District Court was reversed and the cause remanded with directions to enter judgment for the appellants in accordance with Rule 50 (b). Thereupon the plaintiff filed a petition for a writ of *certiorari* which was granted by this Court (60 Supreme Court Reporter 589). The petition was granted on the substantive question of law raised by the case, and there was no consideration in the opinion ultimately rendered of any procedural question under Rule 50 (b). See

Apex Hosiery Co. v. *Leader,* 60 Supreme Court Reporter 982 (1940).

CONCLUSION.

We submit that the decision of the Circuit Court of Appeals was correct and reached a just result. The questions raised under the first two points are not novel or important. The third question has already been answered uniformly by the Circuit Courts of Appeals; *certiorari* has been denied in one such case by this Court; and this Court did not consider this question in another case where it was involved. The petition for a writ of *certiorari* in the case at bar should therefore be denied.

Respectfully submitted,

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October, 1940.